BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Develop Additional Methods to Implement the California Renewables Portfolio Standard Program.	Rulemaking 06-02-012 (February 16, 2006)

PRE-WORKSHOP COMMENTS OF THE CENTER FOR ENERGY EFFICIENCY AND RENEWABLE TECHNOLOGIES ON SB 1036 IMPLEMENTATION

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On May 1, 2008, the Commission's Energy Division circulated a "Request for Pre-Workshop Comments Regarding SB 1036 Implementation" (Energy Division Comment Request). The Center for Energy Efficiency and Renewable Technologies (CEERT) respectfully submits the following pre-workshop comments in response. As directed by the Energy Division Comment Request, CEERT's Pre-Workshop Comments have been served on the electronic service lists in R.06-02-012 (RPS) and R.06-05-027 (RPS) by Noon PST on May 9, 2008.

I.
INTRODUCTION

CEERT was among the parties that requested bifurcation and further consideration of issues related to the implementation of Senate Bill (SB) 1036 that were originally going to be addressed in Resolution E-4160. The final Resolution E-4160 granted this request and designated issues that would be the subject of the workshop now scheduled for May 29, 2008.

While CEERT has an interest in all of the Workshop topics identified in the Energy Division Comment Request, CEERT's Pre-Workshop Comments focus on two issues: contract eligibility for above-market funds (AMFs) and reasonableness review standards for above-MPR (market price referent) contract costs. It is CEERT's position that these issues can only be appropriately resolved in an integrated and uniform basis that relies on a statutory construction of SB 1036, which gives meaning to all of its terms in a manner consistent with the overall intent of

the Renewable Portfolio Standard (RPS) Program law to increase electric generation from renewable resources to meet 20% of retail sales by 2010.

II.
RPS CONTRACT REASONABLENESS REVIEW AND AMF ELIBILITY CRITERIA

In its Request for Comments, the Energy Division proposes "eligibility criteria" that would limit use of AMFs beyond that specifically identified in SB 1036 and seeks input on "whether the Commission should review"*16* different "types of renewable contracts using the same or varying review standards."[1] As a general observation, CEERT would be the first to admit that SB 1036 complicates an already complex process for the procurement of renewable generation. However, CEERT believes that this fact should motivate all stakeholders participating in the upcoming Workshop to find ways to *reduce*, not exacerbate, this complexity in a manner that is not biased against procurement that will benefit ratepayers.

From CEERT's perspective, the discussion of SB 1036 implementation begins with an understanding of the "market price referent" (MPR) and "renewable energy credits" (RECs) and their respective "places" in determining price reasonableness in the procurement of renewable energy. While SB 1036 terminated the supplement energy payment (SEP) fund, incorporation of that fund in the RPS Program at its inception was a recognition that renewable power provided *additional benefits and attributes* beyond that offered by fossil-fueled generation and that a "market price" of brown power would not and did not capture that value. The short-hand for a renewables benchmark, which includes this value, is therefore, appropriately stated as MPR + REC (renewable energy credit or attribute).

[1] Energy Division Comment Request, at pp. 3-5.

In this regard, the Commission has confirmed that the MPR is "not intended to serve as either the floor or ceiling price paid for renewables procurement generally."[2] Further, the RPS Program statute itself expressly recognizes that a "REC" is a component of renewable electric generation that is *in addition to*, and can be "unbundled" and sold separately from, the electricity generated from an RPS-eligible renewable resource.[3] Further, the law requires that a "contract for the purchase of the electricity generated by an eligible renewable energy resource shall, at a minimum include the renewable energy credits associated with all electricity generation specified under the contract."[4] *Yet*, the MPR does *not* include any valuation of the REC, and the statute further proclaims that purchases of "RECs" are *not eligible for consideration as an above-market cost.*"[5] Instead, the Commission is directed to allow utilities "to recover the reasonable costs of purchasing renewable energy credits [RECs] in rates."[6]

Clearly, the Legislature, like the Commission, recognizes the REC as a distinctive property right, separate from the underlying energy generated by a renewable resource. To ensure that the statute is being lawfully enforced, however, the Commission must ensure that the seller of renewable electric generation is begin compensated for the sale of this property that *is* required to be included in any RPS-qualified power purchase agreement. The MPR alone does *not* include this compensation nor does the statute require that such compensation must come from limited "above-MPR funds" (AMFs). In fact, it states the opposite: RECs are not part of or qualified to receive AMFs, and their valuation and cost recovery is to be based on a separate, Commission-determined "reasonableness" standard.[7]

[2] Decision (D.) 08-02-010, at p. 14.
[3] PU Code §399.16(a)(7).
[4] PU Code §399.14(a)(2)(D).
[5] PU Code §399.15(d)(2)(D); emphasis added.
[6] PU Code §399.16(b).
[7] PU Code §399.16(b).

CEERT believes that this fundamental determination of the valuation of RECs must be the starting point for developing any criteria or reasonableness review of RPS contracts. It is only with this interpretation that the Commission will be able to proceed with a consistent, uniform basis for reviewing the reasonableness of *all* RPS-procurement contracts, regardless of their "type," and avoid a "fund," which is now frozen at a specific level that the Energy Division has acknowledged to be "limited," being used to excuse all future RPS procurement, even if well short of legislative targets, when that fund is "exhausted."[8] This outcome is clearly ludicrous and at odds with the intent not only of the RPS statute, but Commission decisions and state and gubernatorial policy from the Energy Action Plan (EAP) loading order to greenhouse-gas (GHG) emissions reduction, all of which are aimed at *increasing*, not limiting or forestalling, reliance on and procurement of renewable electric generation.

For these reasons, CEERT urges the Energy Division and this Commission to adopt policies for pricing review of RPS contracts that do not devolve to either excluding agreements that may well benefit ratepayers and help achieve RPS, EAP, and GHG emission reduction goals or creating artificial bias against or unintended disincentives for use of particular types of agreements. It makes little sense for a "type" of agreement to be arbitrarily excluded from AMFs (other than as designated by statute) or subject to "varying" review standards if the product or project is one that meets the utilities' "least cost, best fit" criteria and benefits ratepayers.

In this regard, the Energy Division proposes that, to preserve the limited AMFs, it is appropriate to go beyond the limitations on eligibility for these funds identified by statute to further require that "eligible" projects be the subject of an "all-in fixed price" contract for a "bundled energy product," be "physically located in California," not otherwise be eligible for

[8] Energy Division Comment Request, at p. 1.

other Commission-approved funding, and "not include firming and shaping costs."[9] Energy Division does not explain how any of these contract features do *not* maximize "the economic benefit to all customer classes" that funded the AMFs.[10] In fact, these features may be among the contract terms that will assist a utility in procuring energy from RPS-qualified, "least-cost, best fit" projects.

Further, the Energy Division has posed the question of the merits of applying "the same or varying review standards" to *16* different types of RPS contracts. The truth is that *if the* review standard for competitively bid projects/contracts (which are the *only* type of contracts eligible for AMFs)[11] is limited to the MPR + any *available* AMFs, but, on the other hand, above-MPR "bilaterally negotiated" contracts continue to be approved on a "reasonableness basis,"[12] there would seem to be little reason for a developer to participate in, or the utility to ever hold, another competitive solicitation. While CEERT is indifferent to the merits of *how* an RPS-qualified energy purchase, which benefits ratepayers, is negotiated or solicited, the Commission itself has noted that "the focus of the RPS program is procurement through competitive solicitations."[13]

Yet, as the California Large Energy Consumers Association (CLECA) noted in its response to the original draft Resolution E-4164, such unintended disincentives or bias will result if competitively solicited RPS contracts must fit into the very narrow limits of MPR + AMFs, while bilateral contracts can be paid "above-market" prices with no discernible cost review standard. Namely, as CLECA stated, "procurement will clearly favor" bilateral negotiations "and the Commission's interest in promoting competitive procurement will be significantly

[9] Energy Division Comment Request, at p. 4.
[10] PU Code §399.8(e).
[11] PU Code §399.15(d)(2)(A).
[12] Resolution E-4164 (April 24, 2008).
[13] Resolution E-4164, at p. 5.

undermined."[14] CLECA's answer to avoid this result is to require, as the Draft Resolution appeared to intend, that "the same review standards" be applied to both bilateral arrangements and competitively procured contracts.[15] To this end, CLECA proposes that "bilateral renewable contracts should … be subject to parallel funding limitations to avoid the creation of a double standard between competitively and non-competitively procured renewable resources."[16]

CEERT agrees that the same cost review standard should apply to the basic (and only) *contract* types identified in the Energy Division's Comment Request: competitively procured or bilaterally negotiated short or long term contracts. The other "types" noted by Energy Division are not actually "contract types," but rather "features" that should be taken into account in reviewing the propriety of any RPS-qualified contract consistent with the utility's RPS plans and least cost, best fit criteria. As an example, contracts at or below the MPR have already been deemed "reasonable per se" by the Commission and do not require further analysis here.[17] Similarly, the scale of the project, whether it is existing, new, or repowered has significance, but only within the context of determining whether procurement from the project meets the utility's least cost, best fit criteria. Finally, it is CEERT's hope that "[t]echnologies that have not been commercially demonstrated" would be subject to viability criteria quite apart from cost recovery considerations.

Similarly, a contract should not be immediately removed from eligibility for AMFs because it includes costs for "firming or shaping" or is located out-of-state. These projects may have the highest value or benefit for ratepayers and the IOU (in terms of meeting its least cost,

[14] California Large Energy Consumers Association (CLECA) Comments on Draft Resolution E-4160, at p. 2.
[15] CLECA Comments on Draft Resolution E-4160, at pp. 2-3.
[16] CLECA Comments on Draft Resolution E-4160, at p. 3.
[17] D.05-12-042, at p. 4, citing PU Code §399.14(f).

best fit criteria) and should not be automatically excluded from AMF eligibility, *if* they otherwise qualify under SB 1036, just for this contract or project feature.

In fact, the *only* circumstance when the question of applicable AMFs or reasonableness price review comes into play is for a contract, no matter how negotiated or for what period of time, that has a price "greater than the MPR." As noted above, the Commission has already determined that contracts priced at the MPR are "per se" reasonable. Thus, the Energy Division can dramatically reduce its "renewable contract types" to whether they are bilaterally negotiated or competitively solicited and are above the MPR.

While CLECA proposes that equal treatment among bilateral and competitively solicited contracts can be achieved by applying an equivalent fund, there is in fact no provision in the law for an additional "AMF" fund for that purpose, and application of the AMFs continue to be limited to competitively solicited contracts. However, the sentiment expressed by CLECA is correct: there should be equivalency in the cost reasonableness review standard applied to all "types" of RPS-qualified contracts to avoid any unintended bias or disincentives depending on contract "type." In this regard, CEERT believes that SB 1036 and the RPS statute as a whole actually provide the answer in how to achieve this end, especially to avoid any claim that the state is engaged in the taking of "property" (the REC) without compensation. Specifically, CEERT recommends that *all* RPS-qualified contracts of all durations, whether bilaterally negotiated or competitively solicited, be reviewed for cost reasonableness expressed by the following equation: MPR + REC.

This approach is specifically supported by SB 1036, which as noted above, in fact requires the Commission to make *two price determinations* for purposes of reviewing the cost reasonableness of all RPS contracts: (1) a determination of the MPR pursuant to PU Code

§399.15(c), and (2) a determination of the cost reasonableness of the REC pursuant to PU Code §399.16(b). CEERT had originally hoped that a timely decision on the use of tradable RECs for RPS compliance would have injected some market-based information into what would otherwise be an administrative determination of a reasonable REC price. However, that decision continues to be delayed. In its absence, however, the Commission is not excused from administratively determining, based on all available information, "the reasonable costs" of RECs that a utility *will* be allowed to recover in rates pursuant to PU Code §399.16(b).

Therefore, in keeping with a statutory construction that gives meaning to all provisions of SB 1036 and is consistent with the legislative intent of the RPS Program law, CEERT recommends the following approach on both reasonableness review standards for RPS contracts and AMF eligibility:

(1) All RPS-qualified contracts, whether short or long term and whether bilaterally negotiated, if priced at or below the MPR, shall continue to be deemed "per se" reasonable.

(2) All RPS-qualified contracts, whether short or long term and whether bilaterally negotiated, if above the MPR, shall be reviewed (and approved) for cost recovery purposes based on a reasonableness review standard expressed as MPR + REC, both of which shall be administratively-determined until reliable market information is available resulting from RECs trading being approved by the Commission for RPS compliance.

(3) The separate REC reasonableness cost recovery standard can also be applied to RECs only procurement, if and when, such "unbundled" procurement is authorized by the Commission.

(4) AMFs should be applied to RPS-qualified contracts that meet the criteria of SB 1036 as being of "no less than 10 years" for projects that are new or repowered after January 1, 2005, are not for procurement of RECs only, have been "selected through a competitive solicitation" pursuant to PU Code §399.14(d), and are "approved by

(5) For AMF-eligible RPS-contracts, the utility has the discretion to determine whether those funds will be applied to cover the cost of the REC (in the reasonableness review equation of MPR + REC) or to apply the AMF to costs incurred above the reasonableness review standard of MPR + REC.

(6) However, to the extent that a utility's AMF funds are exhausted, it will not excuse a utility from meeting its RPS procurement targets (either annual (1%) or overall (20% by 2010)) *if* the utility can sign contracts, whether bilaterally negotiated or competitively solicited, with RPS-eligible facilities or for RECs only procurement (when authorized) at a contract price that does not exceed the cost reasonableness review standard of MPR + REC.

III.
CONCLUSION

CEERT appreciates this opportunity to provide its input on the issues of AMF eligibility and RPS contract reasonableness review. CEERT looks forward to discussing the input of all stakeholders at the May 29 Workshop.

Respectfully submitted,

May 9, 2008 (Noon PST)

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[18] Specifically, the "features" listed at Item 5, page 4, of the Energy Division Comment Request are unnecessary for purposes of determining AMF eligibility and relate to "features" that may in fact benefit ratepayers and, if not, can be considered in a determination of whether the contract meets the utility's RPS Procurement Plan and least cost, best fit criteria and California Energy Commission guidebook requirements for the procurement and delivery of RPS-eligible generation.

CERTIFICATE OF SERVICE

I, Sara Steck Myers, am over the age of 18 years and employed in the City and County of San Francisco. My business address is 122 - 28th Avenue, San Francisco, California 94121.

On May 9, 2008, I served the within document **PRE-WORKSHOP COMMENTS OF THE CENTER FOR ENERGY EFFICIENCY AND RENEWABLE TECHNOLOGIES ON SB 1036 IMPLEMENTATION,** in R.06-02-012, with prescribed electronic service pursuant to Rule 1.10 of the Commission's Rules of Practice and Procedure and the instructions accompanying the Energy Division's Request for Pre-Workshop Comments, on the service lists in R.06-02-012 and R.06-05-027 by Noon, PST, and same-day, separate delivery by U.S. Mail of hard copies to Assigned Commissioner Peevey and Assigned ALJs Simon and Mattson, at San Francisco, California.

Executed on May 9, 2008, at San Francisco, California.

/s/ SARA STECK MYERS
Sara Steck Myers